

Harris (Migration) [2018] AATA 4904 (25 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Brenda Grace Harris
CASE NUMBER:	1701393
DIBP REFERENCE(S):	BCC2016/3233010
MEMBER:	James Lambie
DATE:	25 October 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations

Statement made on 25 October 2018 at 3:13pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – genuine and continuing relationship – parties separated then reconciled – reapplied for partner visa – long distance relationship due to applicant’s work – supporting statutory declarations provided by family and friends – joint financial affairs reported to Centrelink – mutual commitment to a shared life together – decision under review remitted for reconsideration

LEGISLATION

Marriage Act 1961 (Cth) ss 5F, 65
Migration Regulations 1994 (Cth) r 1.15A Schedule 2 cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 11 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 29 September 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because she was not satisfied that the applicant was the spouse or de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 20 August 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Micheal John Douglas Donley, who is the applicant's sponsor.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether Ms Harris is the spouse or de facto partner of Mr Donley.

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties produced a Queensland marriage certificate dated 15 January 2011. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

11. Ms Harris is a Canadian citizen who first entered Australia in August 2008 as the holder of a Temporary Work (Skilled) (subclass 457) visa. The parties first met in 2009 at Woody Point, Queensland. They began living together in June 2010 and were married on 15 January 2011. She has one son and Mr Donley has two from their previous relationships. The couple separated on a trial basis in 2013 and Ms Harris returned to Canada. At this time, they withdrew their application for their partner visa. They maintained communication and decided to reconcile. Ms Harris returned to Australia on 12 September 2014. However, Ms Harris, who has specialised skills as a trainer of guide dogs for the blind, was offered a job in Adelaide and the couple decided that she should move there and to maintain the relationship long distance. When Ms Harris's mother died in November 2015 she returned to Canada, finally re-entering Australia on 20 November 2015. Ms Harris resigned from her position in Adelaide in June 2016 and resumed living with Mr Donley. They moved to new rental premises in January 2017, by which time Ms Harris had secured work with Guide Dogs Queensland. Later that year, Ms Harris became aware of a need for guide dog training in North Queensland. The couple moved to Townsville in January 2018 and intend to stay there long-term.
12. The information provided to the Department at the time of application for the visa was deficient in several respects. It was also deficient when this matter was first scheduled for hearing before the Tribunal. A very significant quantity of additional material was subsequently provided to the Tribunal after the couple engaged a representative and this material, together with the oral evidence provided by the parties, informs this decision. That material is described in more detail below.

13. Financial aspects of the relationship

14. The couple maintain a joint bank account with the Bank of Queensland into which both of their income and from which all of their bills and other outgoings are paid. Statements for the period 25 October 2016 to 25 January 2018 were provided to the Tribunal. The couple gave evidence that Ms Harris takes responsibility for financial decisions. Their private health insurance and car insurance, both in joint names, are paid from the joint account. Their car, a 2009 Suzuki Alto, was purchased and is held in Ms Harris's name. It was financed by money left to Ms Harris by her mother. Mr Donley explained that he has still has some debts incurred before the relationship and he does not want to risk impairing that asset by including himself as an owner. The couple are saving for a boat as a live-aboard proposition. They do not have any interest in acquiring real estate. Their joint financial affairs were reported to Centrelink when Mr Donley was out of work following the move to Townsville.
15. On the evidence, the parties' financial affairs, while relatively modest in scope, are fully integrated and they have implemented and followed a regime as to the management of those affairs. I give this evidence considerable weight.

16. The nature of the household

17. The couple are the co-tenants of a townhouse in Townsville and live together on what they describe as a permanent basis. As mentioned above, they both have children from previous relationships (not living with them), from whom evidence was adduced as to the love and care they receive from both parties and their frequent visits and communications. Both parties expressed their pride that Mr Donley recently became a grandfather.
18. The parties gave evidence as to sharing of household chores: Ms Harris does the general cleaning while Mr Donley vacuums and mops the floors. They describe the share as 50/50, except for the period Mr Donley was not working when he took responsibility for about 80% of the housework. They have a cat, for which Ms Harris takes responsibility for the litter box. They take joint responsibility for the groceries. As mentioned above, Ms Harris takes care of administration, such as paying the bills.
19. The evidence of both parties was consistent as to their household arrangements and I give this factor some weight.

20. Social aspects of the relationship

21. The parties produced evidence by way of statutory declarations from friends and Ms Harris's adult son Cody as to their knowledge of the marriage and their interactions with the couple. They had a close circle of friends while living at Woody Point and undertook frequent social activities with them. The couple also participated in social events with Ms Harris's work colleagues. Since moving to Townsville, while staying in touch with friends from Brisbane, they have sought to create a new social circle through participating in church and musical gatherings. Photographs were produced depicting the couple and others in a variety of social settings. Both parties gave consistent evidence as to their participation in joint social activities, including dining out, attending the local RSL and watching live music.
22. On the basis of the material provided and the evidence given by the parties, I am satisfied that the parties are known to others as a married couple and that they plan and undertake social activities on the same basis.

23. Nature of the parties' commitment to each other

24. One of the complicating factors at the time the visa application was considered by the delegate arose from the circumstances in which the parties separated and later reconciled. They supplied the Tribunal with detailed written submissions by way of statutory declarations as to the background and timeline of the course of their relationship. I have had careful regard to evidence they have given. It cannot, of course, be expected that every relationship should develop and proceed smoothly. Two factors – the illness and death of Ms Harris's mother and the limited vacancies for her highly specialised skills – cannot reasonably be overlooked as relevant to the unsettled period between 2013 and 2016. Given the timing of the resubmitted application, it is unsurprising that the evidence at that time did not provide a compelling case for approval. However, with the passage of time and the relocation of the parties to Townsville, it appears to me that there is little in the material to provoke scepticism.
25. The evidence of the parties is that they draw a very high degree of companionship and emotional support from each other and that they and their families consider the relationship to be long term. I accept that evidence and give weight to it in favour of their application.
26. On the material presented on each of these factors and the evidence and the demeanour of the parties at the hearing, I am satisfied that Ms Harris and Mr Donley have a mutual commitment to a shared life to the exclusion of others, that theirs is a genuine and continuing relationship and that they live together on a permanent basis.

27. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made.
28. Therefore the applicant meets cl. 820.211(2)(a).
29. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

30. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2)(a).of Schedule 2 to the Regulations

James Lambie
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).